No. 84-1491

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PHILADELPHIA NEWSPAPERS, INC., *et al.*,
Appellants,

v.

MAURICE S. HEPPS, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF AMICUS CURIAE THE AMERICAN LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether the Constitution precludes a State from enacting a procedural statute which places upon the defendant in a libel suit the burden of proving the truth of the defamatory statements at issue.

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INTERESTS OF AMICUS CURIAE

The American Legal Foundation ("ALF" or "Foundation") is a national, non-profit, public interest legal center organized and existing under the laws of the District of Columbia for the purpose of articulating the broad public interest in courtroom litigation and administrative proceedings affecting the communications media. ALF currently represents the interests of over 40,000 supporters who reside throughout the United States. This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 36.1.

The Foundation is dedicated to ensuring that the media act in a fair and responsible manner in reporting news and information to the public. In this regard, ALF has directed much of its media litigation efforts to challenging inaccurate news broadcasts and to assisting individuals defamed by the media.

For example, over the past three years, the Foundation has been involved in a number of important libel suits in a variety of capacities (co-counsel, of counsel, *amicus curiae*). These include: *Galloway v. CBS, Inc.*, No. C 345900 (L.A. Super. 1983) (private figure action against "60 Minutes" news program concerning report on medical insurance fraud); *Janklow v. Viking Press, et al.*, No. 14657, *argued* Jan. 9, 1985 (S.Ct. S.D.) (suit by South Dakota Governor raising neutral reportage privilege); *Lewis, et al. v. Port Packet*, 325 S.E.2d 713 (Va. 1985), *petition for cert. denied*, 53 U.S.L.W. 3911 (U.S. July 1, 1985) (No. 84-1723) (private figure libel action concerning standard of proof prerequisite to punitive damage award); *Tavoulareas v. Washington Post, et al.*, No. 83-1605 (D.C. Cir.), *reh'g en banc granted* (June 11, 1985) (business executive's suit over newspaper allegations of corporate nepotism); and *Anderson v. Liberty Lobby*, Docket No. 84-1602, *cert. granted*, 105 S.Ct. 2672 (1985) (whether the "clear and convincing" constitutional standard applies at the summary judgment stage of a public figure libel action).

In addition to the Foundation's regular participation in libel litigation, ALF has also established the nation's only existing Libel Prosecution Resource Center to assist victims of media defamation in suits against the press. Postell, *News Media Under Scrutiny in the '80s*, Trial Magazine, February, 1985 at 72-73. The Center, which began operation in August, 1984, offers a collection of sample briefs, complaints and other types of libel-related pleadings and materials to interested individuals.

Working through its Libel Center, ALF has succeeded in organizing a network of libel plaintiffs' attorneys in approximately 40 states who accept referrals from the Foundation when requests for legal assistance are received by potential libel litigants situated in their locality. The ALF Center also publishes original legal studies on various aspects of defamation law. *See* B. Fein, New York Times v. Sullivan: *An Obstacle to Enlightened Public Discourse and Government Responsiveness to the People* (American Legal Foundation, No. 1, 1984).

Finally, ALF has submitted both oral and written testimony to the U.S. Congress concerning the current state of libel law and how it may best be reformed. *See Hearings on Libel Law and the Administration of Justice of the House Committee on the Judiciary*, 99th Cong., 1st Sess. (June 27, 1985).

Thus ALF's expertise in libel law is well documented. The Foundation has expended an enormous amount of time, effort and money to assist libel plaintiffs in the belief that the public interest is ill served by a legal system that effectively renders both private and public figures powerless to protect their good names against unjust media defamation.

The constitutional issues presented in the instant proceeding directly implicate these concerns. The State of Pennsylvania has wisely chosen to protect its private citizens from defamatory falsehoods causing injury to reputation by placing the burden of proving the truth of the published defamation upon the alleged defamer.[1] The

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[1] The specific provision of the burden of proof statute being challenged provides that: "In an action for defamation, the defendant has the burden of proving, when the issue is properly raised, the truth of the defamatory communication." 42 Pa.C.S.A. § 8343(b)(1). This section is a codification of the State of Pennsylvania's decisional law on this subject. *Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374, 377 (Pa. 1984). The decisional law, in turn, springs from the common law presumption that "in

State of Pennsylvania clearly has the authority to enact this type of provision. Nothing in the Constitution or in the opinions of this Court imposes upon the states any federal substantive limitations as to how, within their own judicial systems, the burden of proving truth or falsity in a libel action involving private citizens must be allocated. Indeed, within "the discrete area of purely private libels," just the contrary is true. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

Not only has this Court consistently reaffirmed the states' strong and legitimate interest in safeguarding private figure reputations, but it has repeatedly rejected all invitations to expand the substantive protections afforded libel defendants in *New York Times* and its progeny to encompass purely procedural determinations such as burden of proof allocations.

Appellants and their legion of supporting media *amici* seek to obscure the paramount considerations of fairness to private figure libel litigants and respect for state sovereignty in our federalist system of government that have undergirded nearly every libel decision issued by this Court in the years subsequent to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Their method of obfuscation is easily discernible. It consists, at bottom, of an unreasonably expansive reading of *Gertz* together with the by now *de rigueur* "chilling effect" rhetoric and a plethora of inapposite analogies to burden of proof requirements in other areas of the law.[2]

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actions for defamation, the general character or reputation of the plaintiff is presumed to be good." *See, id.* and cases cited therein.

[2] For example, appellants vigorously contend that the Pennsylvania burden of proof statute aiding private figure libel plaintiffs is legally equivalent to the burden of proof allocations or presumptions struck down by this Court in criminal or obscenity prosecutions. *See* Brief of Appellants at 26, 27 and 33. Ignoring the obvious distinction that the cases alluded to by appellants involved *Government* suppression of allegedly criminal speech, *Speiser v. Randall*, 357 U.S. 513 (1958); *Freedman v. Maryland*, 380 U.S. 51

But, to reiterate, the Court's touchstones when assessing the First Amendment's reach in private figure libel actions have always been fairness and federalism. In place of these solidly accepted principles, appellants would have this Court further insulate the media from liability and further usurp traditional state prerogatives by fashioning a new constitutional rule forever shifting the burden of proving truth from those who negligently publish to those who are innocently injured. However, such a demand proves too much

Accordingly, ALF's brief will contribute to the just disposition of this matter by demonstrating how appellants' call for the further constitutionalization of state libel law is unsupported in either law or logic and must, therefore, be rejected.

STATEMENT OF THE CASE

In the interests of brevity and judicial economy, *amicus curiae* adopts the statement of the case set forth in the brief of appellees.

SUMMARY OF ARGUMENT

The Supreme Court of Pennsylvania correctly upheld the constitutionality of 42 Pa.C.S. Sec. 8343(b)(1) which

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(1965); or *Government*-deprivation of fundamental liberty interests, *Tot v. United States*, 319 U.S. 463 (1948); *Mathews v. Eldridge*, 424 U.S. 319 (1976), whereas here, the state involvement is negligible, the fact remains that in these "analogous" cases the suppression of speech or deprivation of individual liberty was inherent in the procedural allocation of proof or persuasion. In the instant case, however, there must also be a finding of fault, i.e., negligence, in addition to falsity, prior to any award of damages. Moreover, given that the jury's finding of falsity automatically strips the libel defendant's communications of any constitutional protection, there can be no danger of suppression of protected speech. *See, e.g., Dun & Bradstreet v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866, 4871 (U.S. June 25, 1985) (White, J., concurring) ("Despite our ringing endorsement of 'wide-open' and 'unhibited' debate. . . . we cannot fairly be accused of giving constitutional protection to false information as such.")

places the burden of proving the truth of a defamatory communication on the libel defendant. *Gertz v. Robert Welch, Inc.* does not mandate a contrary conclusion. *Gertz* recognized that the states have a legitimate and substantial interest in protecting the reputations of their private citizens. Moreover, it specifically held that the only restraint upon the states mandated by the First Amendment in civil actions for libel brought by private figures for compensatory damages is that they may not impose liabiliy without fault. The Pennsylvania burden of proof statute is separate and distinct from the constitutionally required fault standard. It is merely a reasonable procedural mechanism for allocating who has the burden of proving the truth or falsity of the defamatory communication. As such, it in no way implicates the substantive constitutional rights afforded libel defendants under *New York Times* and its progeny.

Because appellants refuse to give *Gertz v. Robert Welch, Inc.* its natural and obvious reading and because they openly call upon this Court to impair the legitimate power of the states to protect private figure reputations, their claims must be rejected.

ARGUMENT

This case presents a procedural question of first impression: whether the Constitution precludes a State from enacting a procedural statute which places upon the defendant in a libel suit the burden of proving the truth of the defamatory statements at issue.[3]

Decisions by this Court seeking to define the proper balance between First Amendment guarantees and state libel laws have, in the years subsequent to *New York Times Co. v. Sullivan*, significantly curtailed the ability

[3] In addition to Pennsylvania, five other states have apparently chosen to place the burden of proving truth upon the libel defendant. *See*, Brief of Appellant at 20 fn. 9.

of the states to protect the reputational rights of all of their citizens. However, this Court has not allowed the federalization of state libel law to proceed unabated. Although strict constitutional limitations have been established whenever public officials or public figures seek redress in state courts, the same cannot be said of private figures.

This Court has consistently recognized that "different [constitutional] interests may be involved where purely private libels, totally unrelated to public affairs are concerned." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Accordingly, the Court has held that the states retain a legitimate and substantial interest in protecting the reputations of private citizens. It has granted them wide latitude to enact laws solicitous of private figure reputations. Moreover, it has rejected all attempts, whether in the public or private figure context, to constitutionalize major procedural aspects of state libel law.

The Pennsylvania burden of proof statute falls well within the parameters delimited by this Court in which state libel action is valid. The statute at issue works to safeguard private figure reputations. It is entirely procedural. Most important, it fully comports with the federal rule articulated in *Gertz* that so long as they do not impose liability without fault, the states have unfettered discretion to protect private figure reputations.

THE PENNSYLVANIA BURDEN OF PROOF STATUTE IN DEFAMATION ACTIONS IS FULLY COMPATIBLE WITH PAST LIBEL DECISIONS OF THIS COURT

In *New York Times Co. v. Sullivan*, this Court, writing on a "clean slate," concluded that "libel can claim no talismanic immunity from constitutional limitations" and made significant First Amendment inroads on the ability of the states to protect the reputations of public offi-

cials against critics of their official conduct. 376 U.S. 254, at 299 and 269.

The state libel law at issue in *New York Times* provided that if a publication was "libelous per se," then the defendant had "no defense" as to the stated facts unless he could persuade the jury that "they were true in all their particulars." *Id.* at 267. The Court rejected such a rule as being repugnant to the First and Fourteenth Amendments because "would-be critics of official conduct may be deterred from voicing their criticism." *Id.* at 279. In other words, the availability of the defense of truth, standing alone, was insufficient to negative the self-censorship the Court held would result from the seditious libel aspects of the common law of defamation.

For these reasons, the Court issued a new constitutional rule prohibiting the states from allowing a public official to recover damages for a defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice'—that is with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

New York Times clearly concerned libel litigation initiated by public officials acting as surrogates for the state. It did not address the question of whether the Constitution requires public officials to bear the burden of proving falsity in addition to actual malice as part of their prima facie case. This is because the statements at issue in *New York Times* were concededly inaccurate. *Id.* at 258-259.[4]

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[4] To the extent that dicta in subsequent cases may be read to suggest that the requirement of proving falsity rests upon the plaintiff, these cases also involved either public officials or what were later denominated as public figure libel plaintiffs. *See, e.g., Garrison v. Louisiana,* 379 U.S. 64, 85 (1964); and *Herbert v. Lando,* 441 U.S. 153, 175-76 (1979). Thus they have no applicability to the instant case, which involves a private figure libel plaintiff.

In the years immediately following *New York Times,* this Court struggled between maintaining *New York Times'* public/private figure distinction or adopting a different and much broader subject-matter constitutional standard. *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971). Finally, in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) the Court explicitly rejected the subject matter analysis of *Rosenbloom* and adopted a test which focused on the status of the plaintiff.[5]

The approach outlined in *Gertz* was viewed as a better way to achieve a balance between the constitutional guarantees of free speech, on the one hand, and the states' interest in compensating private individuals for harm from defamatory falsehoods, on the other. The expansive subject matter test called for by a plurality of the members of the Court in *Rosenbloom* was rejected because it would unduly trammel upon the legitimate interests of the states in protecting their private citizens. 418 U.S. at 346.

The *Gertz* court justified its position by noting crucial distinctions between private libel litigants and public officials or public figures who sue to vindicate their reputations. For example, private persons cannot gain access to the media as easily as public persons and are thus unable to counteract defamation by "self-help." This renders the state interest in protecting private persons who are vulnerable to injury more substantial. Also, private persons have not accepted the consequences of public notoriety to the same extent as public officials and public

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[5] Although the *Rosenbloom* opinion has become something of a derelict upon the sea of libel law, it is important to note in passing that this Court was similarly examining the constitutional validity of Pennsylvania's libel law. Moreover, the Court specifically addressed the fact that "Pennsylvania has enacted . . . the [First] Restatement [of Torts'] provisions on burden of proof, which place the burden . . . of truth on the defendant," without even pausing to raise an eyebrow. 403 U.S. 29, 37-38.

figures. In other words, they have not assumed the risk of being subject to certain levels of defamatory falsehoods concerning their activities. Again, this makes it appropriate for the states to retain or devise less stringent means for allowing them recovery in court. *See generally, Gertz*, 418 U.S. at 343-345.

For the above reasons, the Court retreated from federalizing the law of defamation any further. It concluded that "the States should retain *substantial latitude* in their efforts to enforce a legal remedy for defamatory falsehood[s] injurious to the reputation of a private individual." *Id.* at 345-46 (emphasis added). The Court therefore established a less stringent constitutional standard, below which the states may not fall, in order to ensure that First Amendment guarantees are protected:

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood[s] injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.

Id. at 342-48 (footnote omitted).

The Court added some additional limitations on the power of the states to protect private citizens from defamation. For example, it held that a state's interest in compensating a defamed plaintiff extends only to recovery for "actual injury." It also conditioned the recovery of punitive damages by a private figure upon a showing of *New York Times* "actual malice." *Id.* at 350.

The primary limitation placed upon the states by *Gertz*, however, remained the fault requirement. As long as a

state has at least a negligence standard of care to govern libel suits initiated by private citizens, the Court stated that the constitutional guarantees of free speech would be fully satisfied.

It is clear that *Gertz* and the cases following it did not contract the wide latitude afforded states in private figure actions outside the constitutional standard of care requirement. On the contrary, this Court has repeatedly reiterated that "*Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault." *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976). *Cf., Dun & Bradstreet v. Greenmoss Builders*, 53 U.S.L.W. 4866, 4869 (". . . the role of the Constitution in regulating state libel laws is far more limited when the concerns that activated *New York Times* and *Gertz* are absent." (footnote omitted)).

Stated differently, this Court's decisions from *Gertz* through *Dun & Bradstreet* have held that the Constitution requires a finding of some degree of fault as a precondition to a defamation award to a private figure plaintiff. Other than this single constitutional requirement, the states are free to do as they please, as long as such action is reasonable. This is particularly true when it comes to enacting or enforcing purely procedural mechanisms in libel litigation which may prove onerous to libel defendants. Thus, for example, this Court unanimously rejected the proposition that traditional state jurisdictional statutes may be unconstitutional as applied to libel defendants:

> Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. *See New York Times, Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323,

94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. *See, e.g., Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 610 L.Ed.2d 115 (1979) (no First Amendment privilege bars inquiry into editorial process). *See also, Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9, 99 S.Ct. 2675, 2680 n.9, 61 L.Ed.2d 411 (1979) (implying that no special rules apply for summary judgment).

Calder v. Jones, 104 S.Ct. 1482, 1488 (1984).

The Pennsylvania burden of proof standard under attack in this case is purely procedural. It in no way affects or subverts the fault requirement mandated by *Gertz*. In Pennsylvania, if a private figure libel plaintiff is to maintain a cause of action against a libel defendant, he must show fault. This is all that the Constitution demands.

Appellants nevertheless contend that the issue of falsity is somehow inextricably linked to proof of fault. In their expansive reading of *Gertz*, wherever the Court used the word fault, it actually intended to say both "falsity and fault." Thus, their rewording of *Gertz*'s holding would be to the effect that: "so long as they do not impose liability without *requiring the libel plaintiff to prove both falsity and fault*, the States may define for themselves the appropriate standard of liability . . . ." And they would have this Court invalidate the Pennsylvania burden of proof statute because it contravenes this "obvious" mandate.

But this argument proves too much. It is incredible to believe that the Court in *Gertz* refused to say exactly what it meant or silently took it for granted that readers

of its opinion would presume the word fault to denote both fault and falsity.

This Court has made it patently clear in its libel decisions both prior and subsequent to *Gertz* that it is the *conduct* of libel defendants, that is, the degree of fault manifested in publishing false and defamatory information, around which the constitutional protections have been erected. Thus, for example, in *Curtis Publishing Co. v. Butts*, Justice Harlan remarked:

> Our resolution of *New York Times Co. v. Sullivan*, . . . , makes clear . . . that neither the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. *It is the conduct element, therefore, on which we must principally focus*, if we are successfully to resolve the antithesis between civil libel action and the freedom of speech and press.

388 U.S. 131, 152-153 (1967) (emphasis added).

Similarly in *Herbert v. Lando*, Justice White, speaking for the Court, wrote:

> . . . *New York Times* and its progeny made it essential to proving liability that the plaintiff focus *on the conduct* and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. *In other cases proof of some kind of fault, negligence perhaps, is essential to recovery.*

441 U.S. 153, 160 (emphasis added).

Recognizing this fatal flaw in their argument, appellants are forced to resort to fast expository footwork in a misbegotten attempt to direct the Court's attention away from these elementary propositions. Specifically, they attempt to argue that the Pennsylvania burden of proof statute will "inevitably" result in the suppression

of truthful speech. Brief of Appellant at 25, 28-31. In a close case, for example, when the evidence is in equipoise, appellants contend that the burden of proof provision will prompt the jury to declare the speech at issue "false", when in reality it may just as well be "true."

The plain fact, however, is that this is a worst case scenario. Most evidentiary experts who have considered this question have stated that "cases where the trier's mind is in equipoise at the end of its deliberations . . . do[] not occur very often." *See e.g.*, James, *Civil Procedure* § 7.9, 260 (1965). But even were such extreme situations to occur regularly in libel litigation—a dubious proposition at best—there is nothing unconstitutional about a state legislature shifting the burden of proving truth onto libel defendants for reasons of convenience, fairness and/or policy.

In the State of Pennsylvania's case, it is eminently sensible for it to place such a burden on libel defendants, the vast majority of which are media organizations, because of the state's press shield law. As the Supreme Court of Pennsylvania noted, the Pennsylvania shield law has been broadly interpreted:

> As a consequence . . . the plaintiff in a civil libel action is restricted in his ability to prove the falsity of the defamatory statement. He is denied access to the sources of information on which the statement is based. The defendant . . . is therefore in a better position to prove the truth of the defamatory statement.

Hepps v. Philadelphia Newspapers, 485 A.2d 374, 387 (Pa. 1984).

In addition, appellants are simply incorrect in arguing that negligence necessarily follows from falsity. Brief of Appellants at 19-22. As the lower court noted, negligence can be demonstrated in such a way that the issue of truth or falsity never arises. *Hepps v. Philadelphia*

Newspapers, 485 A.2d at 385 (Pa. 1984) fn. 13. In such an instance, although the presumption of falsity may benefit the plaintiff, the burden will still remain on him to prove negligence in order to prevail. Moreover, the Supreme Court of Pennsylvania has interpreted the burden of proof provisions at issue in such a manner that in those rare instances where it is necessary for the libel plaintiff "to prove falsity to establish the negligence of the defendant, it is then the burden of the plaintiff to do so." *Id.*

To reiterate, the constitutional limitations on the states announced in *Gertz* are a prohibition against imposing liability without fault and the requirement that compensatory awards be supported by competent evidence concerning injury. Nothing in *Gertz* or the Constitution requires imposing further limitations on the states. "The First and Fourteenth Amendments do not impose upon the States any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated." *Time, Inc. v. Firestone*, 424 U.S. 448, 461 (1976).

CONCLUSION

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 262 (1974), Justice White remarked that: ". . . [W]e have cherished the average citizen's reputation interest enough to afford him a fair chance to vindicate himself in an action for libel . . . [H]e has had at least the opportunity to win a judgment." However, appellants and their army of supporting media *amici* now seek to make the opportunity for a "fair chance" impossible by having this Court invalidate a reasonable procedural statute based upon centuries of common law experience and designed solely to assist private citizens vindicate their reputations.

Invalidation of the Pennsylvania burden of proof statute would undercut each state's legitimate and substan-

tial interest in this area. Such an action would be a severe blow to the concept of federalism, one which would also "effect substantial depreciation of the individual's interest in protection from . . . harm, without any convincing assurance that such a sacrifice is required . . . ." *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

Accordingly, the judgment of the Supreme Court of Pennsylvania declaring the Pennsylvania burden of proof statute in defamation actions to be constitutional should be affirmed.

Respectfully submitted,

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